Supreme Court, U.S.
FILED
SEP 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-225
86-219
86-224
86-226

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SOUTHERN UNION COMPANY,
UNICON PRODUCING COMPANY,
SOUTHLAND ROYALTY COMPANY, and
EXXON CORPORATION,

Petitioners,

v.

JICARILLA APACHE TRIBE,
DONALD P. HODEL, Secretary of the
United States Department of the Interior,
and STATE OF NEW MEXICO,

Respondents.

On Petition For a Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION OF RESPONDENT JICARILLA APACHE TRIBE

ROBERT J. NORDHAUS
B. REID HALTOM
NORDHAUS, HALTOM, TAYLOR & TARADASH
507 Roma N.W.
Albuquerque, New Mexico 87102
Tel: 505-243-4275

Counsel for Respondent
Jicarilla Apache Tribe

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

Petitioners have presented eleven different questions in four separate Petitions for a Writ of Certiorari. Respondents submit, however, that the real issues are the following:

1. Whether the Secretary made an earlier administrative determination of value or had in fact merely accepted the Petitioners' royalty payments without review or audit.

2. Whether the Secretary's determination that dual accounting was required was reasonable and in accordance with the Secretary's fiduciary obligation.

3. Whether the Secretary's interpretation of the regulations and his requirement of an accounting by the Petitioners involves an important question of federal law warranting consideration by this Court.

LIST OF PARTIES

In order to clarify the relationship of the partie at the times pertinent to this case, Respondent se forth the following relationships of the parties th have existed during the periods the leases were e tered into and amended and during the periods t gas purchase contracts in suit were executed by t parties.

The predecessor of Southern Union Company w Southern Union Gas Company. Gas Company of Ne Mexico was the operating division in New Mexico Southern Union Gas Company. As set forth in no 2 on page 6 of Southern Union Company's (SU brief, Southern Union sold substantially all of the sets of Gas Company of New Mexico (GCNM) to Pu lic Service Company of New Mexico (PNM). SU claims that as part of that sale, SUG retained cert liabilities including liability up to date of sale for ditional royalties which may be assessed in this l gation. SUG does not state what the disposition wo be of royalties held by the District Court in escr or additional royalties paid to the Tribe since ju ment and reimbursed to the producing companies SUG. Counsel for SUG has advised counsel Respondent that the Public Service Commission New Mexico would determine what the disposi would be of any proceeds heretofore paid by the t and reimbursed by SUG to the other produc Petitioners under contracts for reimbursement SUG, in the event the District Court decision is reversed.

Southern Union Production Company (SUPC), p ecessor of Supron Energy Corporation (Supron),

Unicon Producing Company, was a wholly owned subsidiary of Southern Union Gas Company when the leases from the Jicarilla Apache Tribe (the Tribe) were issued to SUG, and the gas purchase contracts at issue herein were executed by SUG and SUPC.

The predecessor of Southland Royalty Company (Southland), Aztec Oil and Gas Company (Aztec), was a wholly owned subsidiary of SUG when the leases from the Tribe were issued to SUG and the gas purchase contracts at issue herein were executed by SUG and Aztec.

The importance of the relationships of these parties to the issues in this case is set forth below in this brief.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	5
REASONS FOR DENYING THE WRIT	11
I. THE SECRETARY'S REQUIREMENT OF DUAL ACCOUNTING AND DETERMINATION OF VALUE WAS REASONABLE UNDER STANDARDS OF ADMINISTRATIVE LAW AND REQUIRED BY HIS FIDUCIARY OBLIGATION	11
A. The Secretary Has a Broad Fiduciary Obligation to the Tribe Which Mandates a Determination of Value Independent of Proceeds to Lessees.	11
B. The Secretary Made No Determination of Value or Interpretation of Law and Regulations as to Dual Accounting Prior to the Tribe's Demand.	14
C. The Secretary Of The Interior Cannot Be Bound By a Prior Interpretation of "Value," That Did Not Exist.	17
D. The Oil Companies Were Correctly Required to Employ Dual Accounting In Order To Determine Value Under The Leases And The Regulations.	18

E. The Leases Require Royalties to be Paid on Market "Value." 23

II. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY COURT OF APPEALS DECISION NOR ANY DECISION OF THE SUPREME COURT 23

A. The Decision Does Not Conflict With This Court's Decisions in *Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana* and *Nevada v. United States.* 24

B. The Decision is Consistent With the Decision of the Ninth Circuit Court of Appeals in *Marathon Oil Co. v. United States,* 794 F.2d 1461 (9th Cir. 1986) the Only Other Court of Appeals Case Decided on the Same Issue. 25

III. THE COURT SHOULD DENY THE WRIT BECAUSE THE QUESTIONS OF FEDERAL LAW ARE BASED ON PECULIAR FACTS INVOLVING ONE INDIAN RESERVATION AND ARE NOT OF IMPORTANCE TO THE NATION AS A WHOLE. 26

A. There are No Special or Important Reasons to Grant the Writ. 26

B. Remand of This Case Would Not be Cost Effective Because a Large Part of Additional Royalties Assessed Were Based on Values in Excess of New Mexico Statutory Price Ceilings and the New Mexico Act has Terminated. 27

C. The Department of Interior is Currently Revising Its Regulations for Determination of the Value of Gas. 29

CONCLUSION 30

TABLE OF AUTHORITIES

CASES:	Page
Atlantic Richfield Co. v. Hickle, 432 F.2d 587 (10th Cir. 1970)	5
Continental Oil Co. v. United States, 184 F.2d 802 (9th Cir. 1950)	18
Hoover & Bracken Energies, Inc. v. Dept. of Interior, 723 F.2d 1488 (10th Cir. 1983)	13
Immigration & Naturalization Service v. Stanisic, 395 U.S. 62 (1969), *reh. denied*, 395 U.S. 987 (1969)	18
Jicarilla Apache Tribe v. Supron, 728 F.2d 1555 (10th Cir. 1984)	4-5
Kenai Oil & Gas, Inc. v. Dept. of Int. of U.S., 671 F.2d 383 (10th Cir. 1982)	11
Lightcap v. Mobil Oil Corp., 221 Kan. 448, 562 P.2d 1, *cert. denied*, 434 U.S. 876 (1977)	23
Marathon Oil Co. v. United States, 794 F.2d 1461 (9th Cir. 1986)	25
Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. ___, 105 S.Ct. 2587 (1985)	24, 25
Nevada v. United States, 463 U.S. 110 (1983)	5, 24, 25
Rice v. Sioux City Cemetery, 349 U.S. 70 (1955)	26, 27
Rudolph v. United States, 370 U.S. 269 (1962)	26
Supron Energy Corp., et al., 46 I.B.L.A. 181 (1980)	17, 18
Udall v. Tallman, 380 U.S. 1 (1965), *reh. denied*, 380 U.S. 989 (1965)	18, 19
United States v. Mitchell (Mitchell II), 463 U.S. 206 (1983)	13
Waechter v. Amoco Prod. Co., 537 P.2d 228 (Kan. 1975), *on rehearing*, 546 P.2d 1320 (1976)	23

Table of Authorities Continued

Page

FEDERAL STATUTES:

Federal Oil and Gas Royalty Management Act of 1982 (30 U.S.C. §§ 188, 191, 1701, 1702, 1711-1723, 1731-1736, 1751-1757 (1986) 13-14

Indian Reorganization Act of June 18, 1934, 25 U.S.C. §§ 476-477 5

Indian Mineral Leasing Act of May 11, 1938, 25 U.S.C. §§ 396a-396g 5, 9, 11, 12

Mineral Lands Leasing Act, 30 U.S.C. § 181, *et seq.* 25

Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432. 4

STATE STATUTES:

New Mexico Natural Gas Pricing Act, N.M. Stat. Ann. 62-7-1 *et seq.* (1978). Terminated effective June 30, 1985, N.M. Session Laws 1984 c.123, §§ 13-15 ..... 4, 27

FEDERAL REGULATIONS:

25 C.F.R. Part 211 (1985) (formerly 25 C.F.R. Part 171) 5, 10

30 C.F.R. Part 221 (1982) 6, 10, 18, 19, 20, 21, 22

OTHER AUTHORITIES:

Report of the Commission on Fiscal Accountability of the Nation's Energy Resources (U.S.G.P.O 1982) 13, 15

Williams and Meyers, *Oil and Gas Law*, § 650 .. 23

51 F.R. 26759 29

BRIEF IN OPPOSITION OF RESPONDENT JICARILLA APACHE TRIBE

This brief is filed in response to briefs of Southern Union Company, Unicon Producing Company, Southland Royalty Company, Exxon Company and amici Conoco, Inc. and Tenneco Oil Company.

OPINIONS BELOW

Respondent adopts the statement of Opinions Below shown on pages 1 to 3 of the Petition of Southern Union Company. Respondent adds to the statements of the Petitioners with respect to the Opinions Below in Respondent's Statement of the Case.

JURISDICTION

The Statement of Jurisdiction contained in the brief of Petitioner Southern Union Company, pages 3 through 4, is adopted by Respondent.

STATUTES AND REGULATIONS INVOLVED

The statement of Petitioner Southern Union Company as to Statutes and Regulations Involved shown on page 4 of said Petition is adopted by Respondent.

STATEMENT OF THE CASE

Petitioners' Joint Appendix will be designated Pet. Jt. App. Respondent's Appendix filed herein will be designated Resp. App.

The Statement of the Case contained in various petitioners' briefs is supplemented and corrected as follows:

The Jicarilla Apache Tribe (hereinafter called "the Tribe") brought this action in the United States District Court for the District of New Mexico on May 7, 1975 against Southern Union Gas Company (SUG) (subsequently Gas Company of New Mexico, (GCNM)), Southern Union Production Company (SUPC) (later Supron Energy Corporation, (Supron)), Aztec Oil and Gas Company (later Southland Royalty Company (Southland)), Exxon Company, U.S.A. (Exxon), and Southern Union Gathering Company (SUGC).

On November 10, 1976, the Tribe settled with GCNM and SUGC pursuant to a Stipulation of Settlement approved by the Court dismissing the Tribe's claims with prejudice against those two Defendants on payment of $600,000 cash to the Tribe and other considerations.

In December, 1976, the USGS Oil and Gas Supervisor ordered lessees to pay royalties for 1971, 1972 and 1973 based on certain minimum prices. In response, Southland paid $16,751.86 and Supron paid $247,374.18. Supron also paid additional royalties of $146,842.24 on liquids in the gas stream for 1974, 1975 and 1976.

The Tribe claimed damages from the corporate Defendants in the amount of the difference between royalties paid from January 1970 and royalties based on market value of gas and liquid hydrocarbons extracted from gas, and that said damages be trebled in accordance with the provisions of the federal antitrust laws, or in the alternative, cancellation of the leases. Against the Secretary of the Interior (the Secretary), the Tribe sought an order that the Secretary had breached his fiduciary obligations to the Tribe and requested a direction that the Secretary carry

out his fiduciary obligations in the area of accounting for oil, gas and liquid hydrocarbon substances, that he require dual accounting, require development of leases, and require offset wells; or in the alternative that the Court take the action requested on behalf of the Secretary for action unlawfully taken or unreasonable delayed.

The case went to trial in May and June of 1979 before the Court without a jury. The Court entered an Order on November 5, 1979 (Pet. Jt. App. 104a) holding with respect to the Tribe's anti-trust claims that although the Tribe had proved technical violations of the Clayton Act by maintaining interlocking directorates that the corporate defendants did not monopolize the market for liquid hydrocarbon substances and generally held against the Tribe on the anti-trust claims. The Court did not address directly plaintiff's claims that the defendant monopolized the *intrastate* markets for natural gas in New Mexico. The Court found that the Secretary failed to require dual accounting for liquid hydrocarbon substances in computing and paying royalties for production from lands on the reservation and ordered the Secretary to submit an accounting setting forth the additional amounts, if any, that the Secretary determined were due and owing to the Tribe, pursuant to dual accounting methods and determinations of value for natural gas. Following various accountings and reaccountings to the court, on July 30, 1980 (Pet. Jt. App. 141a), the Court ordered that, in addition to the dual accounting requirement, the Secretary of the Interior could also consider a minimum value based upon price received by Defendants in computing royalties owed by the Defendants. The Court held that "value"

for royalty purposes could exceed the prices set forth by the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432, and by the New Mexico Natural Gas Pricing Act, N.M. Stat. Ann. §§ 62-7-1, *et seq.*, (1978 & Supp. 1979), and made certain findings concerning calculations of the manufacturing allowance used in dual accounting and concerning accounting for royalties on gas lost between the wellhead and the inlet of the liquids manufacturing plant. (Pet. Jt. App. 141a-153a.)

On June 1, 1981 the Court pursuant to its Memorandum Opinion and Order of that date, awarded judgment in favor of the Tribe and against the lessee Defendants in the amounts set forth in the Secretary's accounting as approved and awarded various crossclaim judgments against Gas Company of New Mexico as follows: (Pet. Jt. App. 165a-174a).

> The Tribe was awarded $24,144.50 from Southland;
> The Tribe was awarded $262,087.24 from Supron;
> The Tribe was awarded $57,705.07 from Exxon;
> Southland was awarded $97,352.67from GCNM;
> Supron was awarded $232,528.23 from GCNM;
> Exxon was awarded $28,817.94 from GCNM;

The Court denied a Motion to Intervene by the State of New Mexico. The various defendants filed appeals from the Final Judgment of the Court. The Tribe filed a Notice of Appeals and Cross-Appeals on August 7, 1981.

A panel of three judges of the Tenth Circuit Court of Appeals reversed the decision of Judge Mechem as to the issues concerning dual acounting, applicability of the New Mexico Gas Pricing Act (NMGPA) to the valuation of royalties payable to the Tribe and breach of fiduciary duty of the Secretary, and affirmed the judgment of the District Court as to the antitrust issues. *Jicarilla Apache Tribe v.*

Supron Energy Corp. et al., 728 F.2d 1555 (10th Cir. 1984). (Pet. Jt. App. 21a-57a).

The Tribe filed a Motion for Rehearing and Suggestion of Rehearing En Banc on March 8, 1984. The Motion for Rehearing was granted by the Court on March 30, 1984.

On rehearing the Court of Appeals issued an *en banc* opinion on January 23, 1986 adopting the dissenting opinion of Judge Seymour. *See* the February 23, 1984 opinion of the Court of Appeals. 728 F.2d 1563 (Pet. Jt. App. 1a-14a). On June 18, 1986 the Court supplemented its *en banc* opinion, disagreeing with the Defendants' argument that the government should pay additional royalties owing to the Tribe as a result of this case because their non-payment resulted from the government's breach of fiduciary duty, distinguishing *Nevada v. United States,* 463 U.S. 110, 114, n. 16 (1983). The Court stated that the failure of the Secretary to require dual accounting resulted in the lessees paying an insufficient amount of royalties under the contract, and that the breach by the Secretary of its fiduciary duty to enforce the leases did not excuse the lessees from subsequently having to pay the amounts determined to be owed under the leases, citing *Atlantic Richfield Co. v. Hickle,* 432 F.2d 587, 592 (10th Cir. 1970). (Pet. Jt. App. 18a-19a).

STATEMENT OF FACTS

The Jicarilla Apache Tribe is an Indian Tribe organized and incorporated under the Indian Reorganization Act of June 18, 1934, 25 U.S.C. §§476-477, residing on an Executive Order Reservation in Rio Arriba and Sandoval Counties in northern New Mexico.

The leases which are the subject of litigation were issued pursuant to the Indian Mineral Leasing Act of May 11, 1938, 25 U.S.C. §§ 396a-396g. (Pet. Jt. App. 200a). The applicable regulations are contained in 25 C.F.R. Part 211 (1985) (formerly 25 C.F.R. Part 171) (Pet Jt. App. 214a)

and 30 C.F.R. Part 221 (1982). (Pet. Jt. App. 238a). The standard lease form issued pursuant to the 1938 Act is shown at Pet. Jt. App. 377a.-386a.

A. The History of the Gas Purchase Contracts and the Dealings of the Parties.

It is particularly important to note, from Plaintiff's Exhibit "5" (Resp. App. A), which is a summary of lease assignments and gas purchase contracts, that all of the leases in suit excepting lease 47 were issued either originally to SUG or its then wholly-owned subsidiaries, Southern Union Production Company (Supron) or Aztec (now Southland). Lease 47 was assigned to SUG shortly after its issuance. SUG assigned a separate undivided one-half interest in Leases 104 and 107 to Humble Oil Company (later Exxon). On January 2, 1984, SUG entered into a lease purchase option agreement to assign separate undivided one-half interest in Leases 100, 103, 105, 106, 145 and 153 to Aztec (later Southland), at that time a wholly-owned subsidiary of SUG. SUG contracted to buy gas from these leases on December 12, 1953 *before Aztec acquired any interest in the leases involved.* The other half interest in Leases 10, 47, 100, 101, 103, 104, 105, 106, 107 145, 150 and 153, was assigned on January 1, 1961 to SUG's other wholly-owned subsidiary SUPC (later Supron). On the same date purchase contracts to purchase gas for the life of these leases were entered into between SUG and SUPC. *See* District Court Opinion, Pet. Jt. App. 106a-107a. Leases 397 and 416 were acquired by Aztec in 1966 and 1969, respectively, while Aztec was a wholly-owned subsidiary of SUG. Gas from these leases was contracted to SUG pursuant to amendment of the December 12, 1953 gas purchase contract with Aztec. SUPC acquired Leases 417 and 418 on May 18, 1969. Purchase of gas from these leases was contracted to SUG by contracts dated December 12, 1953. These lease dates and assignments are shown on the chart, Pl-Exh-5, Resp. App. A. These contracts between SUG and it subsidiaries fixed price schedules for

intrastate gas purchases by SUG in the San Juan Basin, which was still used by SUG for gas sold on the reservation for royalty payments to the Tribe until 1976, when the Supervisor U.S.G.S. wrote to certain producers setting minimum prices for royalties to be paid to the Tribe. Pet. Jt. App. 179a.

It is clear, as a result of the corporate interrelationship of the oil companies, that these lease assignments, gas purchase contracts, and the later gas processing agreements between SUG, SUPC and Southern Union Refining Company, were not arms-length agreements.

As stated by Judge Seymour, the interpretation by the majority panel of the Tenth Circuit Court of Appeals of the royalty accounting obligation would permit the parties to fix royalties at a low figure without recourse for the Tribe or the Secretary. (Pet. Jt. App. 48a).

Whether the relationship and actions of these affiliated companies constituted violations of the antitrust laws or not as found by the District Court, it is abundantly clear that SUG by reason of its control of the market and affiliation with major producers was able to fix prices and enter into arrangements for processing which enabled SUG, Supron and Aztec to profit directly or indirectly from extraction and sale of liquids without paying commensurate royalties to the Tribe.

Southern Union Refining Company, which took over the Lybrook Extraction Plant from Supron at the end of 1976 was initially a wholly-owned subsidiary of Supron and remained a subsidiary of SUG during periods relevant to this case. The relationship of these affiliated companies is outlined in the testimony of Mr. Jack Hertz, Vice President of GCNM. (*See* Resp. App. B).

Resp. App. C shows that not only were prices paid producers by SUG for gas produced from Jicarilla leases lower than the New Mexico average prices, but they were

substantially lower than Federal Power Commission ceiling prices in the years 1971, 1972 and 1973. As the Federal Power Commission stated in its Opinion 658, dated April 11, 1973, Resp. App. D, producer bargaining in the Rocky Mountain area was less effective than elsewhere in the country and that the structure of the buyer segment could well have a regressive impact on exploration and development. As noted by the Commission, the lack of competition in gas purchasing was the primary reason for the low prices prevailing in the San Juan Basin.

B. The Liquids Processing Contracts Benefited SUG and Supron, but No Royalties Were Paid to The Tribe.

SUG built the Lybrook Plant in the 1960's; Supron acquired ownership of the plant in exchange for stock issued by SUG. The original processing agreement entered into January 1, 1971 provided for a ten percent processing fee payable to SUG by Supron. The contract allowed processing of all intrastate natural gas, with gas from the east gathering system being processed at the Lybrook Plant and gas from the west gathering system being processed at the Huerfano Plant. (Resp. App. E.,) A later amendment entered into on May 1, 1972 provided for a 33 1/3% processing fee. (Resp. App. F.) SUG retained the rights to the gas and Supron to all the liquids extracted from gas. There was no provision for payment of royalties to the Tribe for the liquids extracted or for SUG's processing fee, although SUG was the original lessee of most of the leases. Originally there was no provision in SUG's gas purchase contracts for payment to any producers for liquids.

When the original gas purchase contracts were entered into, Aztec (Southland) was a wholly-owned subsidiary of SUG. All these petitioners, except Exxon, benefited from the earnings of SUG and Supron on liquids. Supron argued that although it may have been obligated to account for liquids prior to 1976, it should be relieved of that obligation

after 1976, by the simple process of conveying the plant to another affiliated company.

C. The Applicable Provisions of the Leases, Statutes and Regulations.

All the leases subject to this litigation were issued pursuant to the Indian Mineral Leasing Act of May 11, 1938, 25 U.S.C. §§ 396a-396g. Section 4 of that Act, 25 U.S.C. § 396d provides:

> All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease. (Pet. Jt. App. 201a.)

The leases in this suit were executed in the early 1950's, and the regulations then in effect have not changed since that time in any material respect. The lease form and the regulations clearly vest discretion in the Secretary to determine "value" for computation of royalty. This discretion, as the trial court held and Judge Seymour's opinion clearly demonstrates, is circumscribed by the Secretary's fiduciary obligation to the Tribe.

Paragraph 3(c) of the Standard Lease (Pet. Jt. App. 377a) provides that the royalty at the applicable percentage be computed on "the value or amount of all oil, gas and/or natural gasoline, and/or all other hydrocarbon sub-

stances produced and saved from the land leased herein. . . ."

The lease provides that the Secretary has discretion to ascertain "value" for the computation, and provides further (paragraph 3(c));

> During the period of supervision, "value" for the purposes hereof may, in the discretion of the Secretary, be calculated on the basis of the highest price paid or offered (whether calculated on the basis of short or actual volume) at the time of production for the major portion of the oil of the same gravity, and gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and sold from the field where the leased lands are situated, and the actual volume of the marketable product less the content of foreign substances as determined by the oil and gas supervisor. The actual amount realized by the lessee from the sale of said products may, in the discretion of the Secretary, be deemed mere evidence of or conclusive evidence of such value.

The regulations, 25 C.F.R. § 211.13 (1985) (formerly § 171.13) (Pet. Jt. App. 214a), contain an identical provision for determining "value." 30 C.F.R. § 221.47 and § 221.50 (Pet. Jt. App. 238a) reinforce a conclusion that the Secretary has discretion to determine value based on the highest price paid for a part or a majority of like quality of oil or gas in the same field, and that the Secretary has the obligation to include the value of liquid products in determining royalty, whether these liquid products are extracted by the lessee or by others. The analysis of the applicable lease provisions and regulations are set forth below, pp. 19-23.

REASONS FOR DENYING THE WRIT

ARGUMENT

I. THE SECRETARY'S REQUIREMENT OF DUAL ACCOUNTING AND DETERMINATION OF VALUE WAS REASONABLE UNDER STANDARDS OF ADMINISTRATIVE LAW AND REQUIRED BY HIS FIDUCIARY OBLIGATION.

A. The Secretary Has a Broad Fiduciary Obligation to the Tribe Which Mandates a Determination of Value Independent of Proceeds to Lessees.

Title 25 U.S.C. § 396d (Pet. Jt. App. 201a) quoted above has direct application to the case at hand. This statute confers on the Secretary the authority to promulgate regulations governing operations pursuant to the leases and expresses a congressional policy of establishing a fiduciary relationship in which the particular duties of the trustee and the rights of the beneficiary are delineated. All Jicarilla Apache Tribal lands are held by the United States in trust for the Tribe.

Section 396d clearly establishes a fiduciary obligation on the part of the Secretary, not only to promulgate rules and regulations, but also to *administer* such rules and regulations. Thus, the Tribe contends that the Secretary has a fiduciary duty under § 396d to *enforce* the regulations promulgated under that section. To claim otherwise would be to make a mockery of the acts and the intent of Congress.

In *Kenai Oil & Gas, Inc. v. Dept. of Int. of U.S.*, 671 F.2d 383 (10th Cir. 1982), the Tenth Circuit Court reviewed the fiduciary role of the Secretary of the Interior and his delegates, in the context of the Secretary's trust responsibility for the approval of communitization agreements pursuant to 25 U.S.C. § 396d. In holding that the Secretary or his delegate could not be compelled to approve communitization agreements which would extend

non-productive leases beyond their primary term, the Tenth Circuit Court said: "As a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interest of Indian lessors, and has a duty to maximize lease revenues." *Id.* at 386. The Secretary's construction of regulations and exercise of discretion is "limited by the fiduciary responsibilities vested in the United States as trustee of Indian lands." *Id.* at 386. The Court said further:

> Furthermore, limiting the Superintendent's considerations solely to matters of conservation and production would be inconsistent with his trust responsibilities to the Indians in leasing tribal lands. In light of these trust responsibilities, the Superintendent must take the Indians' best interests into account when making any decision involving leases on tribal lands, and has broad discretion to consider all factors affecting their interests.

Id. at 387. Thus, just as a limitation on the discretion of the Secretary or his delegate in approving communitization agreements would be inconsistent with the Secretary's trust responsibilities, limiting the Secretary's obligation in determining "value" would also be inconsistent with his trust responsibilities.

The purpose of the 1938 Indian Mineral Leasing Act and congressional policy is to obtain the maximum benefit from oil and gas for Indian tribes. The Secretary has a fiduciary obligation to secure this maximum benefit to the tribes. If the Secretary has discretion in administering law and regulations and supervising operations under Indian leases, this discretion must be exercised in light of his fiduciary obligation. If there is more than one "reasonable" choice, as that term is used in administrative law, the Secretary must choose that which is to the best interest of the Tribe.

In the instant case, the Secretary belatedly recognized his fiduciary obligation, both as to determination of value and enforcement of dual accounting, after the demands made by the Tribe and pursuant to the order of the District Court. As is shown in Point B below, there was no prior inconsistent interpretation by the Department—only a long history of inaction in enforcing the provisions of Indian leases and applicable regulations.

Neither the history of administration of the Indian Mineral Leasing Act and regulations, nor the holdings of this Court, are inconsistent with a determination of value which is independent of the price paid or proceeds to the lessee. Thus, the Circuit Court of Appeals for the Tenth Circuit in *Hoover & Bracken Energies, Inc. v. Department of Interior,* 723 F.2d 1488 (10th Cir. 1983), held that royalties were not limited by price paid to the producer, but had to be paid on price plus state severance taxes, even though Indian and federal production were not subject to these state taxes. Petitioners would limit value for payment of royalties to the price paid.

In *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206 (1983), this Court recognized that the timber management statutes established comprehensive responsibilities of the federal government in managing the harvesting of Indian timber, and noted that the government recognized its duties in managing Indian forests so as to obtain the greatest revenues for the Indians consistent with a proper protection and improvement of the forest. Similarly, the Indian Mineral Leasing Act established comprehensive responsibilities in the federal government which give rise to a like obligation to manage tribes' oil and gas resources to obtain the greatest revenue for the Indians consistent with proper protection and improvement of their lands.

The *Report of the Commission on Fiscal Accountability of the Nation's Energy Resources* (U.S.G.P.O. 1982) led to the enactment of the Federal Oil and Gas Royalty Man-

agement Act of 1982 (codified at 30 U.S.C. §§ 188, 191, 1701, 1702, 1711-1723, 1731-1736, 1751-1757 (1986)). In Section 2 of the Act, Congress recognized that the system of accounting with respect to royalties and other payments due on oil and gas produced from federal and Indian lands was archaic and inadequate. The Act stated that it was essential that the Secretary initiate procedures to improve methods of accounting for royalties and to provide for routine inspection of activities related to the production of oil and gas on lease sites. The Act specifically stated that one of its purposes was to "fulfill the trust responsibility of the United States in the administration of Indian oil and gas resources". Section 101(b)(c)(1) required the Secretary to audit and reconcile, to the extent practicable, all current and past lease accounts for leases of oil or gas and take *appropriate actions to make additional collections or refunds as warranted.*" (emphasis added)

It would obviously subvert the purposes and objectives of the Royalty Management Act if the Secretary were bound by previous failures to enforce Indian lease terms or regulations, or if his discretion were so limited that he could not insure that tribes receive the maximum income from the development and exploitation of their resources. Thus, the real issue in this case is whether given two reasonable interpretations, the Secretary's trust responsibilities require him to apply whichever accounting method (Btu or net realization) yields the Tribe the greatest royalty.

B. The Secretary Made No Determination of Value or Interpretation of Law and Regulations as to Dual Accounting Prior to the Tribe's Demand.

Petitioners mistake *inaction* and failure of the Secretary to enforce existing regulations under the mineral leasing laws for a positive administrative interpretation of the regulations and leases. The record is devoid of any evidence of an administrative interpretation to the effect that

"value" equals "proceeds", or that liquids accounting was required only of lessees who operated extraction plants. It is true that lessees who did not operate liquids extraction plants had not previously been required to account for liquids. However, it is also true that no lessees on the Jicarilla Apache Reservation, including those operating extraction plants, had ever been required to account for liquids by action of the Secretary.

The failure of the Department of the Interior to monitor and audit royalties, either for value or for liquids accounting, was made clear by the *Report of the Commission on Fiscal Accountability of the Nation's Energy Resources, supra,* transmitted January 21, 1982 to Secretary of the Interior Watt. This report underscored the vital importance to the Nation of full and correct payment of royalties and the long-standing failure of the Department of Interior to monitor or audit royalty payments on federal or Indian lands.

Prior to 1973, when the Tribe made demands on the Secretary to enforce lease provisions on the reservation, there had essentially been no monitoring or auditing of royalty payments to the Tribe. In a letter of President Hubert Velarde of the Tribe dated June 29, 1973 to the Secretary, the Tribe pointed out that royalties were being paid on artificially maintained low prices; that no royalties were being paid on liquids; and that the Department was failing to enforce other provisions of the leases. (Resp. App. G). On July 29, 1974, a letter was written by the Commissioner of Indian Affairs to the Secretary, asking the U.S.G.S. to provide the Tribe with information as to the true value of oil and gas produced on the reservation from 1953 to the present which should be used in royalty computations, the by-products and amounts thereof derived from the subject production, the cost of manufacture of the above-named by-products and the value of the above by-products. (Resp. App. H). The Department established a "Jicarilla Response Committee" in August, 1974, to re-

spond to the Tribe's demands. The Jicarilla Response Committee obtained cost data on the manufacture on the extraction of liquids and compared the Btu adjustment prices against net realization prices (net realization value equals the value of liquids extracted less cost of manufacture, plus the value of residue gas at the tailgate of the extraction plant). The Response Committee, in its various bi-weekly reports of activities to the Chief of the Conservation Division, U.S.G.S., continued to maintain that the net realization value of natural gas liquids was not as advantageous to the Tribe as the Btu adjustment method.

In 1975, because of the increased market price of extracted liquids, it became apparent that the net realization method would yield a higher value than the Btu adjustment method if actual cost of manufacture were used. Accordingly, at various times on or after December 9, 1976 the Area Oil and Gas Supervisor, U.S.G.S., issued letters to SUPC requiring SUPC to file corrected monthly reports of sale and royalty for 1974, 1975 and 1976 to date to show both Btu and net realization methods of reporting royalty. The corrected reports indicated substantial underpayments and SUPC paid substantial sums to the Tribe in additional royalties based on liquids accounting. *See* I.B.L.A. Opinion (Pet. Jt. App. 179a-180a).

At about the same time, a letter was sent to the Department of the Interior by the Albuquerque Area Office, asking for a determination as to whether producers whose gas was processed though plants which they did not own, would be required to account for liquids. As of the date of trial in the District Court, no decision had been received from the Secretary. *See* Opinion of the District Court (Pet. Jt. App. 133a).

The District Court found that until 1974, producers selling natural gas to SUG were paid a base contract price, plus a penny per Mcf, which they claimed presumably satisfied any obligation that producers had to account for

liquids in the gas stream. From 1974 on, producers received a Btu adjusted price for gas sold to SUG without any additional amount paid for liquids. The Court concluded that the Secretary was required to have producers account to the Tribe by the dual accounting method if gas produced from the lease is processed into component products, whether or not the particular producer owned and operated an extraction plant. (Pet. Jt. App. 132a).

It is thus clear from the record that there was no positive administrative construction or interpretation of the Secretary's obligation to determine value or to require producers to account by the dual accounting method until the Tribe's complaints were received.

C. The Secretary Of The Interior Cannot Be Bound By a Prior Interpretation of "Value" That Did Not Exist.

In *Supron Energy Corp., et al.,* 46 I.B.L.A. 181 (1980) (Pet. Jt. App. 176a-199a), the Interior Board of Land Appeals considered the contention of the oil companies that the Department of Interior, by accepting the companies' monthly reports, had exercised its discretion in determining "value" for royalty purposes. In deciding against the oil companies, the Board found that the Department did not accept the actual sales price as representative of "true value", and that the Department's *first* action to determine "value" was made by the Area Supervisor as a result of this case. The Board explained the practice of billing lessees for royalty on the basis of monthly statements which stated value as sales price, *subject to post audit.* There was no verification by GS personnel as to value.

Likewise, the Oil and Gas Supervisor has now exercised his discretion to determine that "value" on royalties will be calculated by submitting his final accounting to the Court. To successfully override the Secretary's determination of value, Petitioners must submit evidence that he acted in an arbitrary and capricious manner. No such evi-

dence has yet been presented. In fact, the majority opinion of the three-judge panel of the Circuit Court found there was no arbitrary or capricious action, yet overturned the determinations of the Secretary. Such an administrative interpretation by the Department of its own regulations should be given controlling weight unless plainly erroneous or unless it is inconsistent with the regulations. *Udall v. Tallman,* 380 U.S. 1 (1965), *reh. denied,* 380 U.S. 989 (1965); *Immigration & Naturalization Service v. Stanisic,* 395 U.S. 62 (1969), *reh. denied,* 395 U.S. 987 (1969). Petitioners cite *Continental Oil Company v. United States,* 184 F.2d 802, (9th Cir. 1950) for the proposition that the Department cannot reassess royalty value in excess of a previously determined value billed by the Department. *Continental* does not support Petitioners' position, as held by the Indian Board of Land Appeals. In *Continental* the Department had previously issued an order determining value. In this case there had been no such earlier interpretation.

D. The Oil Companies Were Correctly Required to Employ Dual Accounting In Order To Determine Value Under The Leases And The Regulations.

The District Court, in its Memorandum Opinion of November 5, 1979, 479 F. Supp. 536 (1979), concluded "that where, as here, gas produced from the lease is processed into component products, dual accounting is required by the terms of the lease." 479 F. Supp. at 551. (Pet. Jt. App. 131a). This conclusion was consistent with the subsequent independent conclusion of the Interior Board of Land Appeals in *Supron Energy Corp., et al., supra.* with respect to Supron. In that case, the Department held that paragraph 3(c) of the lease clearly requires that the lessees employ dual accounting to determine the value for royalty accounting purposes. The board also determined that the Btu adjustment method was justified by 30 C.F.R. § 221.47, and that the net realization method was justified by 30

C.F.R. § 221.50. (Pet. Jt. App. 261a-264a). Given the independent, though parallel, conclusions of the District Court and the Interior Board of Land Appeals, the weight of that authority clearly indicates that dual accounting by lessees is required under the terms of the lease and the regulations. Further, the Department of Interior's interpretation of its own regulations and lease forms should be given controlling weight. *Udall v. Tallman, supra.*

The oil companies cite the last sentence in 30 C.F.R. § 221.47 for the proposition that the "highest price paid or offered" must be accepted as value for royalty purposes, but they ignore the language of the first sentence, which reads as follows:

> The value of production, for the purpose of computing royalty shall be the estimated reasonable value of the product as determined by the supervisor, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field, to the price received by the lessee, to posted prices and to other relevant matters.

More importantly, they ignore the second sentence of § 221.47, which reads as follows:

> Under no circumstances shall the value of production of any of said *substances* for the purposes of computing royalty be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof *or less than the value computed on such reasonable unit value as shall have been determined by the Secretary.* (emphasis added)

The "substances" referred to above are those listed in § 221.46: "Casinghead or natural gasoline, butane, propane, or other liquid hydrocarbon substances extracted from gas. . . ." Thus, the computation of liquids royalty employing the "value basis" in § 221.47, includes the value

of "liquid hydrocarbon substances" whose value is no less than the "gross proceeds", i.e. sales price, accruing to the lessee, or no less than the "reasonable unit value", i.e. price per gallon or Mcf, as determined by the Secretary. Of course, Supron did extract liquids when it owned the Lybrook Plant, but never accounted for any royalties from plant profits until ordered to do so by the Oil and Gas Supervisor and finally the Court. The facts reveal that when all of the gas purchase contracts were executed, without reserving processing rights, that the sales contracts were made with the companies' parent company, SUG, (except for Exxon) which owned the Lybrook Plant, and that the oil companies' leases were originally held by SUG. Even the majority opinion in the original Tenth Circuit decision apparently requires dual accounting of Supron as a plant operator.

In order for the value of liquids to be computed on such reasonable unit value the *quantity* of liquids must be determined under 30 C.F.R. § 221.46 (Pet. Jt. App. 260a). This section vests broad discretionary authority in the Supervisor to make such determination, and provides for the use of two basic methods. The first method involved the allocation of the "net output" (i.e., "the quantity of each substance that the plant produces for sale") of the products produced from each leasehold by taking into account the "gasoline content" (§ 221.46(b) & (c)) or individual hydrocarbon content (§ 221.46(d)) and the number of leases involved. The second method (§ 221.46(e)) involves the estimation of liquid hydrocarbon production when the first method is not "practicable", *in the judgment of the Supervisor*, by taking into account the "quantity of gas produced from the leasehold and transmitted to the extraction plant", a test for individual hydrocarbon content, and the efficiency of the plant. Further, the Supervisor's estimation of "quantity" under the second method is "determined as to *insure full protection of the royalty interest of the lessor*" (emphasis added), which clearly indicates that this

method must be employed where in the judgment of the Supervisor, the proper and accurate valuation of liquids royalty cannot be otherwise determined or where the royalty interest of the federal or Indian lessor would in effect be diminished or circumvented. Reading § 221.46 in the context of § 221.47, the royalty value for liquid hydrocarbons is calculated by either (1) computing the quantity and unit value of those liquids as determined by the Supervisor and the Secretary or (2) taking the gross proceeds or actual amount realized by a lessee who sold the liquids for extraction.

The method of computation of value for "wet gas" (gas and entrained liquids) under § 221.50(c) (Pet. Jt. App. 265a) is identical with that used for the computation of liquids value under § 221.47, which indicates the comprehensive and compatible scheme of valuation in royalty accounting embodied in the regulations. Section 221.50, in the context of the comprehensive regulatory scheme in Part 221, reveals that it addresses the two basic situations encountered by a lessee producer: subsections (a) and (b) apply where a lessee-producer sells the gas and liquids as components directly to a gas purchaser and a component product purchaser or where the lessee-producer processes the gas and components himself; and subsection (c) applies where, as is the usual case, a lessee-producer sells the gas and liquids as "wet gas". A lessee-producer who sells "wet gas" under § 221.50(c) is *expressly required* to perform dual accounting in order to determine "whichever is greater". Under both regulations and the provisions of paragraph 3(c) of the lease, dual accounting is required, and the value of liquid hydrocarbons must be included in such accounting. Thus, the District Court, the Interior Board of Land Appeals and Judge Seymour were consistent in their interpretations of that section.

The majority of the panel of the Tenth Circuit Court also mistakenly construed the words "produced and sold from the field" as meaning produced and sold from the

leased lands, thus concluding that royalties need be paid only on liquids processed on the leased lands by the lessee.

This latter construction of "field" is c ntrary to the common sense construction of the word us d by industry and by the Supervisor. Thus, the Area Oi and Gas Supervisor in Albuquerque, in determining whe ther additional royalties should be assessed against these oil companies to determine the highest price paid for th e majority of gas produced and sold from the field for t he years 1971 through 1973, assembled complete gas sal s data on all Jicarilla Apache tribal leases, including th ose selling to interstate purchasers. He determined the m dian price for all gas from these leases and adopted these median prices as the *floor* values for each year. The Inte rior Board of Land Appeals held that this was in the dis cretionary latitude granted to the Supervisor by the reg ulations. (Pet. Jt. App. 185a).

The Petitioners erroneously contend that dual accounting should not be required and royalty shou ld not be paid for liquids on their production either becaus e they did not receive any benefit from the liquids or beca se the liquids processing plant owner has no legal obligati on to provide the data they need for dual accounting. T he lessee-producers' claims that they received no benefi t or proceeds from the liquids ignores the fact that they agreed to the gas purchase contract which allowed SUG t take the liquids without compensation. They could have sought relief from the restrictive contract provisions eithe r through negotiation or through the courts. Neverthele ss, their contracts with SUG or GCNM relieve the lesse -producers of the incidence of liability for payment of addit ional royalties resulting from dual accounting by providing that "excess royalty payments" be reimbursed by SUG or GCNM. If the lessee-producers could not, for any reaso n, obtain from the processing plant the data required for du al accounting, then the supervisor's estimation pursuant to 30 C.F.R. § 221.46(e) would be additionally justified a nd would be

substituted for the unobtainable data for the purpose of dual accounting. The claims of the producing companies of actual injury to them as innocent parties is belied by the reimbursement provisions of their contracts with SUG, the party which profited substantially form the additional values secured by extraction of liquids.[1]

E. The Leases Require Royalties to be Paid on Market "Value".

The royalty clause of the standard BIA lease is a typical "market value" clause. Nonetheless, Petitioners construe the royalty clause to require that royalties be paid on the "net proceeds" to the lessee. The courts throughout the United States have long recognized the difference between "market value", "market price" and "net proceeds" royalty clauses. Proceeds and market value are distinguished in *Waechter v. Amoco Prod. Co.*, 537 P.2d 228, 249 (Kan. 1975), *on rehearing*, 546 P.2d 1320 (1976); and in *Lightcap v. Mobil Oil Corp.*, 221 Kan. 448, 562 P. 2d 1, *cert. denied*, 434 U.S. 876 (1977). *See generally*, Williams and Meyers, *Oil and Gas Law*, § 650.2.

This Court should continue to recognize these distinctions and not substitute judicial interpretations for the plain meaning of the lease clause.

ARGUMENT

II. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY COURT OF APPEALS DECISION NOR ANY DECISION OF THE SUPREME COURT

---

[1] The Reimbursement provisions of the contracts between the Gas Company of New Mexico and Petitioners are the basis for judgments by Petitioners against Gas Company of New Mexico and are quoted in the District Court's Memorandum Opinion of June 1, 1981. Pet. Jt. App. 165a-172a.

A. The Decision Does Not Conflict With This Court's Decisions in *Mountain States Telephone and Telegraph Company v. Pueblo of Santa Ana* and *Nevada v. United States.*

Petitioners cite *Mountain States Telephone and Telegraph Company v. Pueblo of Santa Ana,* 105 S. Ct. 2587 (1985) and *Nevada v. United States,* 463 U.S. 110 (1983) as decisions that conflict with the Tenth Circuit decisions in this case. In the *Mountain States* decision, this Court's reversal of the Tenth Circuit's affirmance of a District Court decision setting aside a BIA administrative interpretation was based on the reasoning that the executive officials implementing the Pueblo Lands Act of 1924 were more likely to have an understanding of the actual intent of Congress than judges who must consider the legal implications of the transaction over half a century after it occurred. Petitioners equate this reasoning to Judge Seymour's reasoning and the reasoning of the District Court but fail to recognize that in this case there was no long-standing administrative interpretation. *Mountain States* has no application to a case such as this where the courts as well as the Congress have recognized long-time inaction and failure to enforce lease provisions that have acted to the detriment not only of Indian tribes but of the federal government and of states.

In *Nevada v. United States* relied upon by Petitioners, the tribe's claims against third parties was held barred because the tribe's water rights had been previously adjudicated in a 1913 Federal District Court decree. The third parties in *Nevada* were "thousands of small farmers in northwestern Nevada" who had "specific promises made to their forebearers two or three generations ago." 463 U.S. at 145. (Brennan concurring). Those small farmers had no relationship to the tribe in that case. In contrast, the third parties in this litigation are energy companies who had agreed to lease provisions reasonably susceptible to the interpretation that royalties be based on the highest

value reasonably obtainable under their lessees. In this case the Petitioners merely misinterpreted lease provisions and the Secretary failed to act to enforce these provisions.

B. The Decision is Consistent with the Decision of the Ninth Circuit Court of Appeals in *Marathon Oil Company v. United States*, the Only Other Court of Appeals Case Decided on the Same Issue.

In the recent decision of the Court of Appeals for the Ninth Circuit, *Marathon Oil Company v. United States*, 794 F.2d 1461 (9th Cir. 1986), the Ninth Circuit Court of Appeals concurred with the Court of Appeals for the Tenth Circuit in affirming the Secretary's authority to interpret the royalty provisions of natural gas leases derived from the Mineral Lands Leasing Act, 30 U.S.C. § 181 *et seq.*, That Act and the Act in question grant broad powers to the Secretary. The Mineral Land Leasing Act authorized the Secretary to "prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of (the Act)." 30 U.S.C. § 189. Years after the leases were executed in *Marathon*, the Secretary determined the royalties should be computed on a net back formula rather than the price paid for gas at the wellhead. In the instant case, the Secretary similarly determined that royalties should be computed on a net-realization formula rather than on the price paid for gas at the wellhead, provided that the net-realization formula resulted in the highest payment to the Tribe. The Secretary's interpretation in *Marathon* was also applied retroactively, as in this case.

The decision of the Court of Appeals in this case is in accord with principles of federal trust responsibility that have long been articulated by this Court. There is no real conflict between the decisions of the Court of Appeals in this case and this Court's decisions in *Mountain States* and *Nevada*. The Tenth Circuit decision in this case is supported by the decision of the Ninth Circuit in *Marathon*.

There is thus no important question of federal law which has not but should be settled by this Court, nor has a federal question been decided in this case in a way that conflicts with any decisions of this Court.

ARGUMENT

III. THE COURT SHOULD DENY THE WRIT BECAUSE THE QUESTIONS OF FEDERAL LAW ARE BASED ON PECULIAR FACTS INVOLVING ONE INDIAN RESERVATION AND ARE NOT OF IMPORTANCE TO THE NATION AS A WHOLE.

A. There are No Special or Important Reasons to Grant the Writ.

This court has noted that the "special and important reasons" referred to in Supreme Court Rule 17 must be of importance to the nation as a whole to invoke the discretionary review of this Court. *Rudolph v. U.S.*, 370 U.S. 269, 270, (1962) (Writ of Certiorari dismissed as improvidently granted because "review would be of no importance save to the litigants themselves.") In *Rice v. Sioux City Cemetery,* 349 U.S. 70 (1955), the Court originally granted certiorari to consider a contract prohibiting burial of non-Caucasians in an Iowa cemetery. After the dispute arose, the Iowa legislature passed corrective legislation that prevented a similar situation from occurring again. 349 U.S. at 73. The legislation did not apply to parties in litigation at the time of the enactment; therefore, the issue was still of importance to the parties who had petitioned for certiorari. 349 U.S. at 76. Nevertheless, the court dismissed the writ as improvidently granted, stating that "It is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties. . ." 349 U.S. at 79 quoting Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923). There are no special and

important reasons to grant the Writ in this case, for the reasons stated below.

B. Remand of This Case Would Not be Cost Effective Because a Large Part of Additional Royalties Assessed Were Based on Values in Excess of New Mexico Statutory Price Ceiling and the New Mexico Act has Terminated.

The situation in this case is similar to that in *Rice v. Sioux City Cemetery, supra.* A substantial amount of additional royalties assessed against Petitioners were based on the difference between the ceiling price of natural gas established by the New Mexico Natural Gas Pricing Act of 1978, N.M. Stat. §§ 62-7-1, *et seq.* (NMGPA) and the prices upon which Petitioners based their royalty payments. The prices paid to producers for natural gas for intrastate natural gas in New Mexico were lower than prices prevailing on interstate gas. The District Court held that the New Mexico Legislature had not intended the Act to apply to royalties paid the Tribe and that the Secretary in determining "value" should have established value for royalties paid to the Tribe not limited by the NMGPA. The NMGPA terminated effective June 30, 1985. Chapter 123 N.M. Session Laws 1984 § 15. Petitioners have not requested review as to this portion of the District Court's decision. In the event this case is remanded to the District Court for reaccounting, both the Secretary and the Petitioners would be confronted with an expensive reaccounting, to determine whether the additional royalties paid pursuant to the District Court's judgment were based on dual accounting or on the limits imposed by the NMGPA. Moreover, this reaccounting, in the event that it resulted in partial repayment by the Tribe of additional royalties heretofore paid by the companies (*see* Attachment A to Appellant's Motion to Require Appellees to File Additional Bond or Other Security), (Resp. App. I) would result in payment to Public Service Company of New Mexico and would presumably require proceedings before the Public

Service Commission of New Mexico to determine whether reimbursement to customers of PNM would be required. The cost of these proceedings would in all probability exceed any possible benefits obtained by PNM or Southern Union Company as a result of a remand of this case.

The question also arises as to the effect of the Stipulation for Settlement between Gas Company of New Mexico and the Tribe entered into October 21, 1976. Paragraph one of this Stipulation recites as follows:

> 1. The Tribe and GCNM have entered into a Settlement Agreement, a Royalty Gas Gathering Agreement and a Royalty Gas Purchase Contract, all of even date herewith settling other matters in dispute between the Tribe and GCNM, which Agreements are incorporated herein by reference.

Paragraph 8 of the Stipulation provides as follows:

> 8. All matters in controversy in this case between the Tribe and Defendants GCNM and Southern Union Gathering Company having been settled, the parties hereto request the Court to enter this Stipulation as its final judgment in this case, and the case shall be dismissed with prejudice in its entirety as to GCNM and Southern Union Gathering Company, each party to bear its own costs.
>
> (Resp. App. J)

The District Court stated in its November 5, 1979 Opinion in footnote 2, Pet. Jt. App. 113a, that while evidence revealed that SUG tended to negotiate gas purchase contracts on a "take it or leave it" basis with regard to prices dictated by it, "this at best tends to reveal monopolistic activities attributable not to defendant-lessees, but to SUG, who has bought its peace in this lawsuit. This apparently illegal activity on the part of SUG cannot be imputed to

the defendants remaining in this action." (Pet. Jt. App. 113a, fn.2).

SUG after settling with the Tribe then rejoined the case and is attempting to reach the Tribe through the back door by recovering the monies it has agreed to pay the other Petitioners pursuant to the excess royalty reimbursement contracts with these Petitioners.

C. The Department of Interior is Currently Revising Its Regulations for Determination of the Value of Gas.

On July 25, 1986 the Department of Interior, Minerals Management Service (MMS) published a Notice of Modification to Notice To Lessees Number 5 (NTL-5) entitled "Procedures for Determining Natural Gas Value for Royalty Purposes". The stated purpose of the changes was "to permit MMS to value most natural gas by using the full range of its authority under the royalty valuation regulations in 30 C.F.R. rather than the more restrictive provisions of NTL-5." 51 F.R. 26759. On August 9, 1977 because of questions raised by the Tribe as to the supervision of royalty accounting on Tribal production, and the failure of the U.S.G.S. independently to determine value, the U.S.G.S. caused to be published an Order suspending the operation of NTL-5 to oil and gas leases on the Jicarilla Apache Reservation for an indefinite period as of June 1, 1977. 42 F.R. 40263, August 9, 1977. (Resp. App. K).

On February 5, 1986 the MMS published proposed rules entitled *Product Evaluation For Royalty Purposes.* (Pet. Jt. App. 341a-376a). In the background section of the Notice, it was stated that the Secretary had appointed a Royalty Management Advisory Committee comprised of thirty-one representatives from industry, the states and Indian tribes, which will have as one of its first tasks to advise the Secretary on the new product value regulations. The Advisory Committee held its first meeting in Lakewood, Colorado on January 9 and 10, 1986. It was stated in the Notice that the MMS had decided to make drafts

of the proposed regulations available for public review and comment before issuing formal notices of proposed rulemaking. It was made clear that the draft regulations set forth in the Notice were not final and would be subject to change after consideration of the recommendations of the Advisory Committee. (Pet. Jt. App. 341a-343a).

In view of the pending issuance of new regulations, the Court should not pre-empt the Department of Interior by interpreting existing regulations. The questions raised by Petitioners with respect to interpretation of the present regulations will be of no national importance in the future.

CONCLUSION

Respondent submits that the true purpose of Petitioners' and Amici's efforts to overturn the decision of the Court of Appeals for the Tenth Circuit on Rehearing is a thinly disguised attempt to prevent the Secretary in the future from auditing royalty payments made by these companies to Tribes and states, and to perpetuate past practices of accepting "net proceeds" as reported by producers as "value". The issues raised here pertain only to the Jicarilla Apache Reservation and are not of importance to the nation as a whole. There are, in reality, no issues raised which have not already been decided against the Petitioners in the Circuit Courts and in this Court.

Respectfully submitted.

ROBERT J. NORDHAUS
B. REID HALTOM
NORDHAUS, HALTOM, TAYLOR & TARADASH
507 Roma N.W.
Albuquerque, New Mexico 87102
Tel: 505-243-4275

Counel for Respondent
Jicarilla Apache Tribe

APPENDIX

RESPONDENT'S APPENDIX
TABLE OF CONTENTS

Page

APPENDIX A—Summary—Lease Assignments and Gas Purchase Contracts (Plaintiff's Exhibit 5)* 1a

APPENDIX B—Testimony of Mr. Jack Hertz, Vice President of Gas Company of New Mexico. (10 C.A. App. Vol.IV, A-639-642). 2a

APPENDIX C—Natural Gas Prices—Summary. (Plaintiff's Exhibit 64).* 5a

APPENDIX D—Opinion No. 658, Federal Power Commission, p. 28 (10 C.A. App. Vol. VII, A-1250). 6a

APPENDIX E—Amendment of Gas Processing Agreement. (10 C.A. App. Vol. VII, A-1219). 8a

APPENDIX F—Gas Processing Agreement dated May 1, 1972 between Southern Union Gas Company and Southern Union Production Company. (10 C.A. App. Vol. VII, A-1221). 10a

APPENDIX G—Letter from Hubert Velarde, President, Jicarilla Apache Tribal Council to Honorable Rogers C.B. Morton dated June 29, 1973. (10 C.A. App. Vol. I, A-20-22). 13a

* Plaintiff's trial exhibits are exhibits of Respondent herein.

APPENDIX H—Memorandum to Secretary of the Interior from Commissioner of Indian Affairs dated July 29, 1974. (Plaintiff's Exhibit 29, No. 10).* 17a

APPENDIX I—Attachment A to Appellant's Motion to Require Appellees to File Additional Bond or Other Security. (Filed July 10, 1986 in 10th Circuit Court of Appeals, by Respondent herein). 19a

APPENDIX J—Stipulation for Settlement. (10 C.A. App. Vol. VII, A-1297-1301). 20a

APPENDIX K—42 Federal Register 40263, August 9, 1977. ..... 25a

APPENDIX A

Summary—Lease Assignments and Gas P

(Plaintiff's Exhibit 5)

AZTEC OIL* (SOUTHLAND OIL)
1-1-55 ASSIGNED 100(1/2), 101(1/2), 103(1/2), 105(1/2), 106(1/2)
145(1/2), 150(1/2), 153(1/2), 12-17-66 ACQ. 397, 3-24-69 ACQ. 416

12-12-53

1950-72 100%
SOUTHERN UNION PRODUCTION CO.* (SUPRON)* 1972-76 71%, 1976-PR
1-1-61 ASSIGNED 10, 47, 100(1/2), 103(1/2), 104(1/2), 105(1/2)
106(1/2), 107(1/2), 145(1/2), 150(1/2), 153(1/2), 5-18-69 ACQ. 417 AND 418

SOUTHERN UNION GAS CO.*
SOUTHERN UNION CO. *
GAS CO. NEW MEXICO *

1-1-61
HUMBLE OIL (EXXON)
5-20-52 ASSIGNED 104(1/2) AND 107(1/2)

CONSOLIDATED
8-12-64 ASSIGNED 106(1/2)

11-15-63, 12-4-63
TENNECO
9-1-64 ASSIGNED 108(1/4), 109(1/4), 110(1/4)

10-21-64
ATLANTIC (ARCO)
3-7-52 ASSIGNED 108(1/2), 110(1/2), 12-9-52 ASSIGNED 109(1/2)

DELHI OIL & GAS CO.*

10-21-64
CONTINENTAL
9-1-64 ASSIGNED 108(1/4), 109(1/4), 110(1/4)

10-21-64
PANAM (AMOCO) 10-3-61 ASSIGNED 102

HONOLULU OIL

10-25-56

SKELLY 198(1/2)

11-2-60

SINCLAIR 198(1/2)

11-23-60

urchase Contracts

GAS PURCHASE CONTRACT SUG* (GCNM)*

GAS PURCHASE
ESENT 28½% O&G 100% GAS PROCESSING CONTRACT SUG*
GAS PURCHASE CONTRACT SUG* (GCNM)*
GAS PURCHASE CONTRACT EL PASO NATL. GAS
GAS PURCHASE CONTRACT SUGC*

9-27-54

GAS PURCHASE CONTRACT SUG*(GCNM)*

GAS PURCHASE
CONTRACT SUG*
GAS PURCHASE CONTRACT SUG*(GCNM)* GAS PURCHASE
CONTRACT EL PASO

GAS PURCHASE CONTRACT SUG*(GCNM)*

GAS PURCHASE CONTRACT SUG*(GCNM)*

GAS PURCHASE CONTRACT SUG*(GCNM)*

GAS PURCHASE CONTRACT SUG*(GCNM)*

GAS PURCHASE CONTRACT SUG*(GCNM)*

GAS PURCHASE CONTRACT SUG*(GCNM)*

APPENDIX B

TESTIMONY OF MR. JACK HERTZ, VICE PRESIDENT OF GAS COMPANY OF NEW MEXICO (10 C.A. App. Vol. IV, A-639-642)

* * * * *

Q Now, Mr. Hertz, I'm still a little bit unclear about all these corporate relations. As I understand it, Southern Union Company is a Delaware corporation, is that right?

A Southern Union Corporation is a Delaware corporation.

Q And it operates a public utility business through two separate divisions?

A Yes. If I may, the company previously was Southern Gas Company. The Southern Gas Company owned utility operations in four states: Texas, Oklahoma, New Mexico and Arizona and April of 1976, the Board changed the name of Southern Union Gas Company to Southern Union Company, a Delaware corporation. Two public utility divisions were created; one, Gas Company of New Mexico, a Division of Southern Union Company, operating, owning and operating properties in New Mexico; and Southern Union Gas Company, a Division of Southern Union Company, owning and operating the natural gas public utility properties and in fact, a few water properties in Texas, Oklahoma and Arizona.

The two divisions were then of about equal size. The division concept of operation is certainly not unusual. The reason for creating divisions rather than subsidiary corporations is very basic. It's to avoid the complications of further requirements of the Public Utility Holding Company Act of 1975, which basically requires that any corporation that owns more than ten percent of the stock of a corporation engaged in the public utility business is subject to the Holding Company Act.

Q Now, as we're talking as of today, Gas Company of New Mexico is a Division of Southern Union Company and what was, and the name of Southern Union Gas Company belongs to another Division of Southern Union Company?

A That's correct.

Q There's no corporate relationship between Southern Union Company and Southland Royalty Company, is there?

A There is not now nor has there ever been.

Q And the only relationship between those two companies is the contractural relationship by virtue of the Natural Gas Purchase Contract that Southland succeeded to when it purchased Aztec?

A That's correct.

Q Now, would you explain what the business of Gas Company of New Mexico is?

A Gas Company of New Mexico is engaged in the natural gas public utility operation, purchasing gas at various points throughout the State, through wellhead purchases and transportation of gas through its own gathering systems.

Purchases of gas from Southern Union Gas Company, a wholly-owned gas company of Southern Union Company, operating in Northwest New Mexico and performing a swing function of being able to take gas production from the San Juan Basin, from the so-called jurisdictional or FPC-regulated gathering system and making those sales to the Gas Company of New Mexico when the market will not absorb those quantities of gas, namely in the summertime.

They sell those to El Paso, executed in 1973.

The Gathering Company assumed this function in 1953. At times when the Gas Company of New Mexico requires this gas supply for its New Mexico market to meet its winter peaks and higher load demands, that gas swings to Gas Company of New Mexico from the interstate market.

Q The Gathering Company is a separate corporation, though?

A Gathering Company is a separate Delaware corporation, authorized to do business in New Mexico.

Q And it's a wholly-owned subsidiary of Southern Union Company?

A Yes.

Q What is Southern Union Refining Company?

A Southern Union Refining Company is now a wholly-owned subsidiary of Southern Union Company and is also a Delaware corporation.

* * * * *

APPENDIX C

NATURAL GAS PRICES—SUMMARY

(Plaintiff's Exhibit 64)

	Estimate SUG[1] Purchases Leases In Suit	Estimate SUG[2] Purchases JAT Leases	New Mexico[3] Average Price	Intrastate Natural Gas Prices For Selected States[4] New Contracts	Renegotiated Or Amended	Average Price[5] All Jicarilla Gas	FPC Interstate Ceiling Price
1970	.1413	.1414	.1449				
1971	.1405	.1406	.1529			.148337	.1300
1972	.1374	.1389	.1884			.149210	.2358
1973	.1610	.1637	.2396			.183812	.2400
1974	.3279	.3260	.3201			.239484	.4360
1975	.3733	.3820	.4201	.5530-1.9824	.4524-1.8754	.312280	.5102
1976	.8933	.9200	.5801	1.0381-2.0260	.4000-1.9881	.350809	.5204
1977	1.6431	1.5658	.8243	.8857-2.1943	.7563-2.1244	.617022	.8958
						1.190179	

[1] Leases #10 (.50), 100, 101, 103, 104, 105, 106, 107, 145, 150, 153, 418 (.667).

[2] Leases #10 (.50), 38, 39, 76, 77, 100, 101, 102 (.417), 103, 104, 105, 106, 107, 109 (.077), 110 (.103), 121, 122, 124, 125, 145, 147, 150, 151, 153, 418 (.667), 420.

[3] New Mexico Oil and Gas Accounting Commission, Summaries by Year.

[4] *Monthly Energy Review*, Dept. of Energy, States Included: California, Kansas, Louisiana, Oklahoma, Texas.

[5] Based on data supplied by U.S.G.S.

Dr. Parker Report 3-30-79, #14

APPENDIX D

OPINION NO. 658

FEDERAL POWER COMMISSION
(10 C.A. App. Vol. VII, A-1250)

Before Commissioners: John N. Nassikas, Chairman
Albert B. Brooke, Jr., and Rush Moody, Jr.

Docket No. R-425

Area Rate for the Rocky Mountain Area)
)

OPINION NO. 658

OPINION AND ORDER ESTABLISHING JUST AND REASONABLE RATES AND INITIAL RATES IN THE ROCKY MOUNTAIN AREA

(Issued April 11, 1973)

* * *

[page 28]

We must take note also that producer bargaining in Rocky Mountain is less effective than elsewhere in the country and that the structure of the buyer segment could well have had a regressive impact upon exploration and development. El Paso is the sole interstate purchaser in the San Juan area, the Aneth subarea and in Apache County, Arizona; Montana-Dakota Utilities and Northern Natural are the sole purchasers in the Montana-Dakota subarea; only three transmission companies purchase in the Uinta-Green River subarea; and only two interstate pipelines purchase in the Colorado-Julesburg subarea.

We are not persuaded that time will correct the problem of the low rate levels prevalent in Rocky Mountain. From 1959 to 1969, average revenue for all deliveries of Rocky Mountain gas to interstate pipelines increased by only 1.2 cents from a level of 13.5 cents/Mcf to 14.7 cents. In contrast, since 1959, gas-well drilling costs have increased by 55 percent, wage levels in the oil and gas industry by 56 percent, and the general price level in the economy by 40 percent.

We note also that in the early 1950's, the contract prices in the San Juan area were roughly the same as for the Permian Basin. For the composite Rocky Mountain Area, the contract prices differed but little from the average prices for the Southwest market as a whole. The differential between prices in the Rocky Mountain Area and in other parts of the market widened thereafter. In the Southwest, gas prices increased through 1960 as the market became more competitive on the buying side. In the Rocky Mountain region, however, new contract prices have been virtually unchanged for a period of 20 years. Over this period, there have been sharp increases in price levels in the economy, in the value of gas as a commodity, in the costs of alternate fuels, and in the costs of doing business. . . .

APPENDIX E

AMENDMENT OF GAS PROCESSING AGREEMENT (10 C.A. App. Vol. VII, A-1219)

THIS AGREEMENT made and entered into this 1st day of December, 1971 by and between SOUTHERN UNION GAS COMPANY, a Delaware corporation (herein referred to as "Gas Company"), and SOUTHERN UNION PRODUCTION COMPANY, a Delaware corporation (herein referred to as "Production Company")

WITNESSETH THAT:

WHEREAS, Gas Company and Production Company entered into a Gas Processing Agreement dated so as to be effective as of January 1, 1971 respecting the processing of natural gas through the Lybrook Plant and the Huerfano Plant of Production Company (such agreement being herein called the "Processing Agreement"),

NOW, THEREFORE, Gas Company and Production Company do hereby mutually agree as follows:

1. Section 6 of Article I entitled "Definitions" of the Processing Agreement shall be and the same is hereby modified and amended so as to hereafter read and provide as follows:

> "Section 6. "Residue Volume" as used herein shall mean the Gathered Volumes of natural gas remaining after shrinkage arising out of (a) use of gas for processing plant fuel, (b) the plant processing of the gas for extraction of gasoline and other hydrocarbon constituents other than methane."

2. Section 2 of Article II entitled "Processing of Gas" of the Processing Agreement shall be and the same is

hereby modified and amended so as to hereafter read and provide as follows:

> "Section 2. The Gathered Volumes of gas that are gathered by Gas Company in the East Gathering System shall be processed by Production Company through the Lybrook Plant for extraction of gasoline and other hydrocarbon constituents other than methane; and likewise the Gathered Volumes of gas that are gathered by Gas Company in the West Gathering System shall be processed by Production Company through the Huerfano Plant for extraction therefrom of gasoline and such other hydrocarbon constituents other than methane as Production Company may elect from time to time. . . ."

APPENDIX F

GAS PROCESSING AGREEMENT DATED MAY 1, 1972 BETWEEN SOUTHERN UNION GAS COMPANY AND SOUTHERN UNION PRODUCTION COMPANY.

(10 C.A. App. Vol. VII, A-1221)

GAS PROCESSING AGREEMENT

THIS AGREEMENT made and entered into so as to be effective as of the 1st day of May, 1972, by and between SOUTHERN UNION GAS COMPANY, a Delaware corporation (herein referred to as "Gas Company"), and SOUTHERN UNION PRODUCTION COMPANY, a Delaware Corporation (herein referred to as "production Company"):

* * *

IV.

PAYMENT

Section 1. As consideration in addition to the benefits accruing to Gas Company from processing of gas delivered into its pipelines and as payment in full for all Plant Products removed from the Gathered Volumes and for gas used as fuel for plant operations and flared in connection with plant operations, Production Company shall pay to Gas Company the following amounts:

(a) Thirty-three and one-third percent (33-1/3% of the gross proceeds of sale of all Plant Products extracted from the Gathered Volumes and sold by Production Company that remain after deduction of any taxes based on the sale and any trucking or transportation charges

incurred by Production Company in the delivery of such products from the plants to the point of sale; plus

(b) An amount equal to that by which (i) the aggregate quantity of gas used by Production Company as fuel for operation of the Lybrook Plant and the Huerfano Plant, respectively, plus the quantity of gas that is flared by Production Company in operation of such plants determined in accordance with Section 1 of Article III hereof, plus the shrinkage in the Gathered Volumes of gas that is attributable to extraction of Plant Products therefrom determined in accordance with Section 2 of Article III hereof shall exceed (ii) 55 cubic feet of gas per gallon of Plant Products removed by Production Company from the Gathered Volumes, priced at the applicable General Service Rate Schedule of Gas Company on file and in effect from time to time with the New Mexico Public Service Commission covering sales of gas to industrial consumers on an interruptible basis.

Section 2. On or before the 15th day of each calendar month Production Company shall deliver to Gas Company a statement showing:

(a) The number of gallons of Plant Products extracted from the Gathered Volumes during the preceding month and the gross proceeds of sale therefrom after deduction of any taxes based on the sale and any trucking or transportation charges;

(b) The quantities of gas (i) that were used during the preceding month by Production Company as fuel for operation of the Lybrook Plant and the Huerfano Plant, respectively; (ii) that

were flared by Production Company in operation of such plants during the preceding month; (iii) that constitute shrinkage in Gathered Volumes attributable to extraction of Plant Products during the preceding month, and

(c) The amount due to Gas Company on account of plant processing during the preceding month.

Amounts due and owing to Gas Company because of processing during each calendar month shall be paid by Production Company to Gas Company on or before the 25th day of the next succeeding calendar month.

APPENDIX G

LETTER FROM HUBERT VELARDE, PRESIDENT, JICARILLA APACHE TRIBAL COUNCIL TO HONORABLE ROGERS C.B. MORTON DATED JUNE 29, 1973. (10 C.A. App. Vol. I, A-20-22)

THE JICARILLA APACHE TRIBE

June 29, 1973

Honorable Rogers C.B. Morton
Secretary of the Interior
United States Department of Interior
Interior Building
18th and C Street Northwest
Washington, D. C. 20240

Re: Oil and Gas Leases, Jicarilla Apache Tribe

Sir:

Referring to our letter of March 23, 1973, with respect to royalty payments by the various lessees of the Jicarilla Apache Tribe under oil and gas mining leases, please be advised that our attorneys have been engaged in investigation of royalty payments made by various lessees for the past three months.

Our attorneys find a number of apparent violations of the provisions of these leases. Please address any correspondence with respect to these matters to Robert J. Nordhaus, attorney, 610 Simms Building, Albuquerque, New Mexico 87101, with a copy to the Jicarilla Apache Tribe.

1. Under provisions of paragraph 2(c), "Rental and Royalty" the lease provides that the "value" for the purpose of computing royalties shall be calculated on the basis of the highest price paid or offered—at the time of production

for the major portion of oil of the same gravity and gas and/or natural gasoline and/or all other hydrocarbon substances produced and sold from the fields where the leased lands are situated and the actual volume of the marketable product less content of foreign substances as determined by the Oil and Gas Supervisor. The actual amount realized by the lessee from the sale of said products may, at the discretion of the Secretary, be deemed evidence of or conclusive evidence of such value.

Royalties currently being paid for gas production on tribal lands are based on prices ranging from approximately 13¢ to over 30¢ for the same quality of gas produced. Further, the "value" for the purposes of the lease, should be based on the commodity value of gas, not a price artificially maintained at a low level by one or two purchasers of gas in a non-competitive market.

The Tribe demands that the Secretary take immediate action to determine the proper price basis for royalties paid to the Tribe and to secure an accounting from the companies for past royalties based on prices which do not reflect the "value" of the gas, as defined in the leases.

2. With respect to production under the majority of leases, no royalty is currently being paid on the value of natural gasoline and other hydrocarbon substances produced and saved from the leased land, contrary to the provisions of the leases.

3. As of March 31, 1973, Lessees owed past due amounts of over $400,000.00 for royalties, according to the audit reports of the accounting division of the U.S.G.S. in Roswell, New Mexico. In some cases these past due balances have been owing in lesser or greater amounts for 12 months or more. The attorneys for the Tribe are presently determining the status of past due balances. Demand is made that you require that these companies pay interest on past due balances, or that the penalty provisions of

Section 171.22 of the Regulations pertaining to leasing of tribal lands be invoked (25 CFR Sec. 171.22).

4. Section 3(c) of the leases in question provide that royalties shall be due and payable monthly on the last day of the calendar month following the calendar month in which produced. Uniformly over the period of production royalties have been paid sixty to ninety days after the end of the calendar month in which produced. Lessees should be required to pay estimated royalties in advance, or to pay interest on amounts past due under the provisions of the lease.

5. The monthly statements provided by the lessees under many leases currently do not show the value of by-products produced and saved, and no royalties are paid on such by-products. Reports currently show only gas and the price received from the producer.

Under paragraph 2(f) the lessees are required to exercise reasonable diligence in drilling and operating wells for oil and gas on the lands covered hereby while such products can be secured in paying quantities. It is believed that your department has failed to require diligence in drilling and developing the properties of the Tribe.

6. Under paragraph 4(b) the Tribe has the right to use sufficient gas free of charge for any buildings belonging to the Tribe by making connection at its own expense with well or wells thereon. Under this provision, your department should secure gas for school and other buildings belonging to the Tribe, at a cost that reflects only the cost of transporting the gas from the well head to tribal buildings.

7. It is the opinion of the Tribal Council of the Jicarilla Apache Tribe that as a result of various factors and influences, including price ceilings maintained by the Federal Power Commission, in which you have acquiesed, that royalties which have been paid to the Tribe over a period of

years have not been based upon the "value" of gas within the meaning of the above leases and that you have failed to protect the rights of the Tribe by securing for the Tribe royalties based on such "value". Your acquiescence in acceptance of royalties based on the prices maintained at an artificially low level as above stated has constituted a condemnation of the Tribe's property for public use without due process of law, with complete disregard for your obligation as guardian and trustee for the Tribe.

Demand is therefore made upon you for immediate action to correct the above mentioned discrepancies, or the Tribe will take action on its own behalf.

Yours very truly,

/s/ HUBERT VELARDE,
HUBERT VELARDE, President
Jicarilla Apache Tribal Council

APPENDIX H

MEMORANDUM TO SECRETARY OF THE INTERIOR FROM COMMISSIONER OF INDIAN AFFAIRS DATED JULY 29, 1974. (Plaintiff's Exhibit 29, No. 10)

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

Trust Services
Minerals

Memorandum
To: Secretary of the Interior Acting Deputy

From: Commissioner of Indian Affairs

Subject: Jicarilla Apache Tribe—Oil and Gas Royalty Issue

In letters dated March 23, 1973, and June 29, 1973, copies of which are enclosed, the Jicarilla Apache Tribe requested the Secretary to determine the true value of oil and gas produced on the Jicarilla Reservation since 1953 and take steps for collection of any delinquent royalties not paid, and further stated that if satisfaction of the request were not forthcoming the tribe would institute whatever legal action was deemed advisable. By letter dated June 25, 1973, from the Deputy Assistant Secretary to the President of the Jicarilla Apache Tribe, the Tribe's March 23 letter was acknowledged and by copy thereof, the Director, USGS, was requested to prepare a report on the matter. At this time, no report as requested has been received.

In a meeting in the Commissioner's office on June 25, the tribal representatives made a further request that the USGS, through the Secretary's Office, be asked to provide the tribe with the data previously requested, which would include the determination of:

1. The true value of the oil and gas produced on the Jicarilla Reservation from 1953 to present, which should be used in royalty computations.
2. The by-products and amounts thereof derived from the subject production. (These should be accounted for in the future.)
3. The cost of the manufacture of the above named by-products.
4. The value of the above by-products.

In compliance with the Tribe's wishes, we respectfully ask that you again request the Director, USGS, to provide the data previously indicated.

cc: Albuquerque Area Director, USGS

APPENDIX I

Attachment A to Appellant's Motion to Require Appellees to File Additional Bond or Other Security: (Filed July 10, 1986 in 10th Circuit Court of Appeals by Respondent herein)

ADDITIONAL ROYALTIES PAID BY SUPRON DEFENDANTS PURSUANT TO JUDGMENT

	Supron	Southland	Exxon	Knott	Hill	Total
Dec. 1979	$ 4,603.81	$ 3,780.41	$ 196.58	$ 49.39	-0-	$ 8,630.19
Jan. 1980	9,777.40	*	*	*	*	18,905.43
Feb. 1980	222.96	*	*	*	*	431.09
Mar. 1980	14,550.39	7,824.98	1,106.01	114.41		23,595.79
Apr. 1980	12,574.76	10,365.77	982.55	146.30		24,069.38
May 1980	15,143.94	10,640.60	561.67	130.46		26,476.67
June 1980	1,333.06	-0-	-0-	-0-		1,333.06
July 1980	-0-	-0-	-0-	-0-	-0-	-0-
Aug. 1980	6,694.45	5,520.99	110.39	94.89		12,420.72
Sept. 1980	4,163.22	2,647.38	-0-	33.35		6,843.95
Oct. 1980	7,695.86	6,329.77	263.67	101.16		14,390.46
Nov. 1980	19,856.55	15,713.77	1,682.38	190.85		37.443.55
Dec. 1980	2,462.53	1,987.83	-0-	7.77		4,458.13
Jan. 1981	6,118.87	4,927.80		120.86		11,167.53
Feb. 1981	5,102.02	4,232.99		90.93		9,425.94
Mar. 1981	5,788.59	4,646.19		97.99		10,532.77
Apr. 1981	7,457.87	6,130.60		113.11		13,701.58
May 1981	2,293.07	1,533.92		43.51		3,870.50
June 1981	1,327.62	755.83		13.58		2,097.03
July 1981	1,437.05	*	*	*	*	2,322.66
Aug. 1981	263.25	-0-		-0-		263.25
Sept. 1981	2,579.03	2,006.05		58.70		4,643.78
Oct. 1981	1,136.53	580.93		21.77		1,739.23
Nov. 1981	4,841.42	3,890.82		101.60		8,833.84
Dec. 1981	20,723.95	15,916.29		245.57		36,885.81
Jan. 1982	20,518.94	15,267.74		192.69		35,979.37
Feb. 1982	18,915.79	14,301.70		182.73		33,399.52
Mar. 1982	14,208.35	10,302.79		139.35	12.81	24,662.80
Apr. 1982	16,207.30	12,077.64		139.01	17.38	28,441.33
May 1982	3,081.38	884.43		36.12	.41	4,002.34
June 1982	*	*	*	*	*	16,259.79
July 1982						
Aug. 1982	13,678.35	10,264.04		84.04	30.31	24,056.74
Sept. 1982	22,649.49	-0-	-0-	-0-	-0-	22,649.49
Oct. 1982	*	*	*	*	*	26,890.01
Nov. 1982	27,737.27	-0-	-0-	-0-	-0-	27,737.27
Dec. 1982	32,912.39	-0-	-0-	-0-	-0-	32,912.39
Jan. 1983	39,232.61	-0-	-0-	-0-	-0-	39,232.61
Feb. 1983	*	*	*	*	*	26,034.63
March 1983	13,358.27	9,439.15	-0-	-0-	-0-	22,797.42
March 1983	416.385	8.575	-0-	-0-	-0-	424.96
April 1983	19,513.41	15,302.105	-0-	213.455	108.33	35,137.30
May 1983	*	*	*	*	*	15,345.62
June 1983	*	*	*	*	*	8,835.52
July 1983	*	*	*	*	*	9,302.96
Aug. 1983	*	*	*	*	*	12,444.30
Sept. 1983	*	*	*	*	*	15,566.30
Nov. 1983	*	*	*	*	*	20,382.78
GRAND TOTAL						$766,977.79

Attachment A

APPENDIX J
(10 C.A. App. Vol. VII, A-1297-1301)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

THE JICARILLA APACHE TRIBE,
Plaintiff,

v. No. ___ Civil

SOUTHERN UNION GAS COMPANY,
a Delaware corporation, *et al.*,
Defendants.

STIPULATION FOR SETTLEMENT

Come now the Plaintiff, The Jicarilla Apache Tribe, an Indian Tribe organized and incorporated under the laws of the United States of America, (the "Tribe"), Defendant Gas Company of New Mexico, a division of Southern Union Gas Company, a Delaware corporation, (formerly Southern Union Gas Company), ("GCNM"), and Defendant Southern Union Gathering Company and hereby stipulate and agree as follows:

1. The Tribe and GCNM have entered into a Settlement Agreement, a Royalty Gas Gathering Agreement and a Royalty Gas Purchase Contract, all of even date herewith settling other matters in dispute between the Tribe and GCNM, which Agreements are incorporated herein by reference.

2. The Jicarilla Apache Tribal oil and gas leases covering Tribal lands in Rio Arriba County, New Mexico, give the

Tribe the right to take its royalty gas in kind upon the giving of notice as provided for therein. It is agreed with respect to all of the tribal oil and gas leases on Tribal lands that if and to the extent the Tribe takes its royalty gas in kind, and if and to the extent GCNM may at such time have gathering systems connected to such wells, then subject to the payment of reasonable transportation charges therefor, GCNM agrees to gather and deliver, and to permit the Tribe to take its share of the royalty gas from wells from which GCNM purchases gas at a point on the Tribal reservation lands from the GCNM gathering pipeline system, upon reasonable written notice, which shall be not less than ninety (90) days, from the Tribe to GCNM, any necessary tap, connections and other facilities necessary to effect such delivery shall be installed by GCNM at GCNM's expense, and the Tribe shall provide rights-of-way and other surface rights therefor free of cost to GCNM. The point of delivery to the Tribe shall be at a point on GCNM's existing gathering system having the pipeline capacity to deliver such royalty gas without construction of any additional pipeline or compression facilities.

3. GCNM's performance under the Royalty Gas Gathering Agreement with the Tribe is excused until it is established by a court of competent jurisdiction or by agreement of the parties hereto and the parties claiming otherwise that GCNM has the right to gather and deliver the Tribe's royalty gas taken in kind. Until such determination has been made, GCNM's performance under said agreement is subject to the claims of Southern Union Production Company and other parties having contractual rights to process said gas or to the liquid products derived therefrom. In the event GCNM, Southern Union Company, or any other subsidiary or division of Southern Union Company does not acquire ownership of the Lybrook Processing Plant, and/or successfully negotiate contractual arrangements to permit GCNM to gather and deliver the

Tribe's royalty gas taken in kind and to permit the Tribe to process such gas at the point of such delivery, by March 1, 1977, the parties hereto agree to resume negotiations to arrange an alternate method of delivery of the Tribe's royalty gas. GCNM further agrees to purchase, and the Tribe agrees to sell to GCNM, under the terms of the Gas Purchase Contract of even date herewith, any portion of the Tribe's royalty gas taken in kind which is in excess of the Tribe's daily requirements.

4. If the Tribe does not elect to take its natural gas in kind, but a producer selling under a contract to GCNM is ordered by the Court or voluntarily agrees to make accounting to the Tribe for its royalty interest on the basis of a net realization method, other liquids method or BTU adjustment method of accounting, then GCNM agrees to cooperate with said producer in furnishing information for such accounting to the Tribe.

5. GCNM shall pay the Tribe within ten (10) days after the approval of this stipulation by the Court and entry of the same as its judgment, the sum of Six Hundred Thousand Dollars ($600,000.00) for settlement of all claims made by the Tribe against GCNM and Southern Union Gathering Company in this case and for execution concurrently herewith of an agreement concerning pipeline rights-of-way, facility sites and other surface leases or easements and for agreement that all claims and causes of action of the Tribe against GCNM and Southern Union Gathering Company set forth and alleged in the First Amended Complaint on file herewith are released and discharged and all such claims and causes of action are dismissed with prejudice as to the defendants GCNM and Southern Union Gathering Company.

6. GCNM's agreement to gather and deliver the Tribe's royalty gas may be subject to regulations by State or Federal authorities having jurisdiction. To the extent that such State or Federal authorities have jurisdiction, the parties agree that this agreement is subject to such rules

and regulations as may be imposed by such authorities. The parties agree to cooperate in seeking any approvals which may be required by such authorities, if any, and to secure the agreement provided for in Paragraph 3 above, to effectuate the intent of this agreement.

7. This Stipulation shall be construed to pertain to all claims of the Tribe against GCNM and Southern Union Gathering Company relating to oil and gas, including rights-of-way matters, accruing to the date of this Stipulation. All of said claims merge into this Stipulation and are governed by its terms.

8. All matters in controversy in this case between the Tribe and the Defendants GCNM and Southern Union Gathering Company having been settled, the parties hereto request the Court to enter this Stipulation as its Final Judgment in this case, and the case shall be dismissed with prejudice in its entirety as to GCNM and Southern Union Gathering Company, each party to bear its own costs.

Executed this 21st day of October, 1976, in several counterparts, each of which shall be considered an original.

THE JICARILLA APACHE TRIBE

ATTEST:

/s/ Barbara Gonzales
Secretary

By /s/ Dale Vigil
Acting President

NORDHAUS, MOSES & DUNN

By /s/ ROBERT J. NORDHAUS
Robert J. Nordhaus
Attorneys for
The Jicarilla Apache Tribe

GAS COMPANY OF NEW MEXICO

ATTEST:

/s/ Illegible
Secretary

By /s/ W. T. Baumhouse
President

MONTGOMERY, FEDERICI,
ANDREWS & HANNAHS

/s/ JACK HERTZ
Jack Hertz
Vice President and General
Attorney for Gas Company of
New Mexico

By /s/ William Federici
Counsel for Gas Company of
New Mexico

SOUTHERN UNION
GATHERING COMPANY

ATTEST:

/s/ Illegible
Secretary

By /s/ Illegible
Vice President

MONTGOMERY, FEDERICI,
ANDREWS & HANNAHS

By /s/ William Federici
Counsel for Southern Union
Gathering Company

APPENDIX K

42 FEDERAL REGISTER 40263, AUGUST 9, 1977

Geological Survey

[NTL-5]

VALUE OF NATURAL GAS FOR ROYALTY PURPOSES

On May 4, 1977, the Geological Survey published in the FEDERAL REGISTER (Vol. 42, No. 86, pp. 22610-22611) its final notice to Lessees and Operators, NTL-5. This Notice sets forth the procedures to be utilized for royalty computation purposes in determining the value of natural gas produced from Federal and Indian oil and gas leases under the jurisdiction of the Geological Survey.

Pursuant to a request by the Acting Deputy Commissioner of Indian Affairs, the application of NTL-5 to oil and gas leases on the Jicarilla Apache Indian Reservation in New Mexico is hereby suspended for an indefinite period, effective as of 7 a.m., June 1, 1977.

V.E. McKELVEY,
Director.